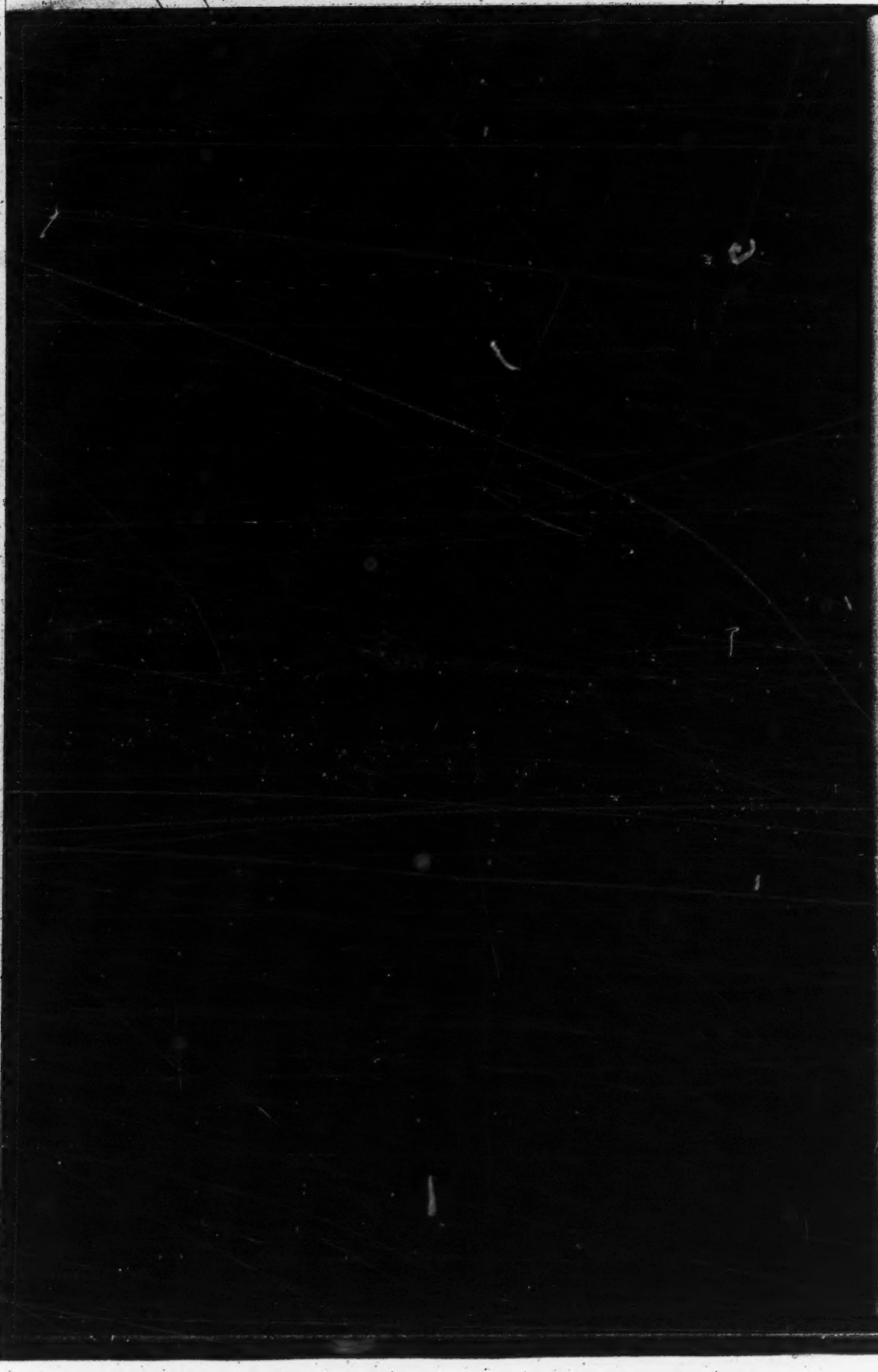

No. _____

IN THE

Supreme Court Of The United States

October Term, 1966

HOWARD PRICE d/b/a HOWARD PRICE AND COMPANY,

Appellant,

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation, and BURL A. SAWYERS, as State Road Commissioner,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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MOTION TO DISMISS

Appellees, pursuant to Rule 16(1) (b) of the Revised Rules of the Supreme Court of the United States, move that appellant's appeal be dismissed on the ground that the judgement of the Circuit Court of Kanawha County, West Virginia rests on an adequate non-federal basis.

STATEMENT OF THE CASE

In 1960, appellant entered into a contract with the State Road Commission of West Virginia for construction work on a portion of Interstate Highway 64. Subsequently, the Road Commission, appellee herein, declared appellant's performance to be in default and caused appellant to be removed from the project. The sequence of events described in appellant's jurisdictional statement on pages 1 and 2 are substantially correct.

As noted by appellant on page 3 of his jurisdictional statement, he filed a petition for mandamus in the Circuit Court of Kanawha County, West Virginia, seeking to compel appellees herein to institute proceedings in eminent domain to condemn his property, allegedly taken without due process. The sequence of events noted on page 3 of appellant's jurisdictional statement is correct.

ARGUMENT

I

It is true that the Circuit Court of Kanawha County up-

held the constitutionality of Article VI, Section 35 of the Constitution of West Virginia against appellant's repeated assertion of its repugnancy to the 14th Amendment to the United States Constitution. However, as will be shown, the judgment rested on an adequate non-federal ground, independent of the "immunity" clause of the State Constitution. With an adequate non-federal ground to support the judgment, review by this Court is precluded. Fox Film Corporation v. Muller, 296 U. S. 207.

It is suggested that the Circuit Court of Kanawha County principally based its decision on the fact that eminent domain would not lie in a case such as was presented. In the court's opinion, noted at page 89a of appellant's jurisdictional statement, it is stated: "* * * However, I am of opinion that there are two issues which are decisive of the question here involved. The first of these is whether or not this contract is a proper subject for an eminent domain proceeding * * *." And, at page 90a, the court said: "* * * I can conceive of no manner in which this or any other court having jurisdiction in matters of eminent domain can properly entertain a proceeding dealing with the subject such as is found here." The Circuit Court of Kanawha County, construing the Constitution of West Virginia as it relates to eminent domain, decided that such proceedings were not proper in a contract dispute. The Court also noted that mandamus would not lie in any circumstance where there is no clear legal right to the writ.

II

As appellant has stated, this Court dismissed appellant's former appeal in a per curiam opinion at 282 U. S. 20. This

Court stated: "The motion to dismiss is granted and the appeal is dismissed in light of the representations of the Attorney General of West Virginia that there is open to the appellant an effective state procedure of which he has not availed himself." Appellees' former motion to dismiss, reproduced starting at page 75a of appellant's jurisdictional statement, suggested that two remedies existed; (1) the eminent domain proceeding, and (2) a claim against the State under the provisions of Chapter 14, Article 2, of the West Virginia Code. (See pages 81a, 82a and 83a of appellant's jurisdictional statement.) This Court, in its per curiam opinion (382 U. S. 20), did not state which of the two suggested remedies would be correct. Appellant has tried the eminent domain route and found it barred. Now, he should exhaust the remedy provided by the State and prosecute his claim against the State.

The Legislature of the State of West Virginia, in its 1967 session, established and created a "Court of Claims." The official acts of the Legislature have not yet been codified so the only available reference source is the bill as enrolled in the office of the Secretary of State. The bill, Enrolled Senate Bill No. 332, was passed March 11, 1967 and becomes effective on July 1, 1967. The complete bill is set out in Appendix A to this motion to dismiss. Now, appellant cannot complain that he is forced to submit his claim to the Attorney General, who formerly acted as an administrative agency of the Legislature in the processing and hearing of claims against the State. Under the provisions of the legislation, appellant as a claimant is entitled to a full evidentiary hearing before the Court of Claims.

It is recognized that the Court of Claims' findings are

not binding on the Legislature. It is, however, the remedy which the State has provided in cases such as the one herein. Appellant has been told that he cannot proceed by way of declaratory judgment or by way of eminent domain. It is apparent that the Court of Claims was created for just such a situation as here exists. Indeed, Section 1 of the bill (Appendix A) provides that "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state * * * cannot be determined in the regular courts of the state * * *." The Legislature thus recognized and specifically approved of the immunity clause. In Cunningham v. County Court of Wood County, 148 W.Va. 803, 134 S.E. 2d 725, the West Virginia Supreme Court of Appeals, in 1964, considered the doctrine of sovereign immunity. "* * * Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement, to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

CONCLUSION

It is respectfully submitted that the judgement appealed from rests on an adequate non-federal ground and that appellant has available an adequate state remedy which

he has not pursued. Therefore, it is submitted and argued that the appeal should be dismissed.

Respectfully submitted,

C. DONALD ROBERTSON
ATTORNEY GENERAL
STATE OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

GEORGE H. MITCHELL
ASSISTANT ATTORNEY GENERAL
STATE OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

APPENDIX A

ENROLLED

Senate Bill No. 332

(By Mr. Jackson)

[Passed March 11, 1967; in effect July 1, 1967.]

AN ACT to repeal sections one, three, four, five, six, seven, eight, nine, ten, eleven and twelve, article two, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend said article two by adding thereto twenty-eight new sections, designated sections one, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, creating a court of claims; providing a legislative purpose and definition; providing for a clerk and other employees thereof;

the terms and meeting place of said court, the compensation, oath and qualifications of the judges thereof; providing the general powers and jurisdiction of the court; establishing exclusions to the jurisdiction; providing for the rules of practice and procedure; establishing a regular procedure, shortened procedure, and advisory determination procedure; providing for claims under existing appropriations and special appropriations; establishing a period of limitation; providing for compulsory process, inclusion of awards in the budget, records to be preserved, and for the reports of the court; prohibiting fraudulent claims and providing a penalty and forfeiture upon conviction thereof; providing for the conclusiveness of the court's determination; specifying policy concerning awards; providing for representation of the state by the attorney general; and providing a severability clause.

Be it enacted by the Legislature of West Virginia:

That sections one, three, four, five, six, seven, eight, nine, ten, eleven and twelve, article two, chapter fourteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed, and to amend said article two by adding

thereto twenty-eight new sections designated sections one, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight and twenty-nine, to read as follows:

ARTICLE 2. CLAIMS AGAINST THE STATE.

§14-2-1. Purpose.

The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in the regular courts of the state; and to provide for proceedings in which the state has a special interest.

§14-2-3. Definitions.

For the purpose of this article:

"Court" means the state court of claims established by section three of this article.

"Claim" means a claim authorized to be heard by the court in accordance with this article.

"Approved claim" means a claim found by the court to be one that should be paid under the provisions of this article.

"Award" means the amount recommended by the court to be paid in satisfaction of an approved claim.

"Clerk" means the clerk of the court of claims.

"State agency" means a state department, board, commission, institution, or other administrative agency of state government: *Provided*, That a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of the state regardless of any state aid that might be provided.

§14-2-4. Creation of court of claims; appointment and terms of judges.

The "Court of Claims" is hereby created. It shall consist of three judges, to be appointed by the president of the Senate and the speaker of the House of Delegates, by and with the advice and consent of the Senate, one of whom shall be appointed presiding judge. Each appointment to the court shall be made from a list of three qualified

nominees furnished by the board of governors of the West Virginia state bar.

The terms of the judges of this court shall be six years, except that the first members of the court shall be appointed as follows: One judge for two years, one judge for four years and one judge for six years. As these appointments expire, all appointments shall be for six-year terms. Not more than two of the judges shall be of the same political party. An appointment to fill the vacancy shall be for the unexpired term.

§14-2-5. Court clerk and other personnel.

The court shall have the authority to appoint a clerk. The clerk's salary shall be fixed by the joint committee on government and finance, and shall be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations, and shall issue all official summonses, subpoenas, orders, statements and awards.

The joint committee on government and finance may employ other persons whose services shall be necessary

1) to the orderly transaction of the business of the court, and
2) to their compensation.

§142-6. Terms of court.

The court shall hold at least two regular terms each year, on the second Monday in April and September. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the court whenever the number of claims awaiting consideration, or any other pressing matter of official business, make such a term advisable.

§142-7. Meeting place of the court.

The regular meeting place of the court shall be at the state capitol, and the joint committee on government and finance shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the state, the court may convene at any county seat.

§142-8. Compensation of judges; expenses.

[illegible] receive [illegible] dollars [illegible] and actual expenses

incurred in the performance of his duties. The number of days served by each judge shall not exceed a hundred in any fiscal year, except by authority of the joint committee on government and finance. Requisitions for compensation and expenses shall be accompanied by sworn and itemized statements, which shall be filed with the auditor and preserved as public records. For the purpose of this section, time served shall include time spent in the hearing of claims, in the consideration of the record, in the preparation of opinions, and in necessary travel.

§14-2-9. Oath of office.

Each judge shall before entering upon the duties of his office, take and subscribe to the oath prescribed by article four, section five of the constitution of the state. The oath shall be filed with the clerk.

§14-2-10. Qualifications of judges.

Each judge appointed to the court of claims shall be an attorney at law, licensed to practice in this state, and shall have been so licensed to practice law for a period of not less than ten years prior to his appointment as judge. A judge shall not be an officer or an employee of any

branch of state government, except in his capacity as a member of the court, and shall receive no other compensation from the state or any of its political subdivisions. A judge shall not hear or participate in the consideration of any claim in which he is interested personally, either directly or indirectly.

§14-2-11. Attorney general to represent state.

The attorney general shall represent the interests of the state in all claims coming before the court.

§14-2-12. General powers of the court.

The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the state from suit, or for some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the state. No liability shall be imposed upon the state or any state agency by a determination of the court of claims approving a claim and recommending an award, unless the claim is (1) made under an existing appropriation, (2) in accordance with section eleven of this article, or (3) [illegible] a special appropriation, as provided

in section twenty of this article. The court shall consider claims in accordance with the provisions of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. Each claim shall be considered by the court and if, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

§14-2-13. Jurisdiction of the court.

The jurisdiction of the court, except for the claims excluded by section fourteen, shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contracto and ex delicto, against the state or any of its

agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any state agency.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

§14-2-14. Claims excluded.

The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

2. For a disability or death benefit under chapter twenty-three of this code.

3. For unemployment compensation under chapter twenty-one-a of this code.

4. For relief or public assistance under chapter nine of this code.

5. With respect to which a proceeding may be maintained against the state, by or on behalf of the claimant in the courts of the state.

§14-2-15. Rules of practice and procedure.

The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims. Rules shall permit a claimant to appear in his own behalf or be represented by counsel.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh, in accordance with its evidential value, any information that will assist the court in determining the factual basis of a claim.

§14-2-16. Regular procedure.

The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and

shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is prima facie within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During the period of negotiations and pending hearing, the state agency, represented by the attorney general, shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the facts an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability and may examine

or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within thirty days.

§14-2-17. Shortened procedure.

The shortened procedure authorized by this section shall apply only to a claim possessing all of the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court and file the same with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

§14-2-15. Advisory determination procedure.

The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the state or a state agency. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk, the record of the claim including a full statement of the facts, the conten-

tions of the claimant, and such other materials as the rules of the court may require. The record shall submit specific questions for the court's consideration.

2. The clerk shall examine the record submitted and if he finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the request that the necessary additions or changes be made.

3. When a claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the officer who referred the claim. An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be de novo.

§14-3-19. Claims under existing appropriations.

A claim arising under an appropriation made by the Legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the appropriate state agency, the state auditor, and to the governor. The governor may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to

further review by the auditor upon any matter determined and certified by the court.

§14-2-20. Claims under special appropriations.

Whenever the Legislature makes an appropriation for the payment of claims against the state, then accrued or arising during the ensuing fiscal year, the determination of claims and the payment thereof may be made in accordance with this section. However, this section shall apply only if the Legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount of the award shall be fixed by the court. The clerk shall certify each approved claim and award, and requisition relating thereto, to the auditor. The auditor thereupon shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim or claim except for the question of a sufficient unexpended balance in the appropriation.

§14-2-21. Periods of limitation made applicable.

The court shall not take jurisdiction of any claim, whether accruing before or after the effective date of this article, unless notice of such claim be filed with the clerk within such period of limitation as would be applicable under article two, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, if the claim were against a private person, firm or corporation and the constitutional immunity of the state from suit were not involved; but the foregoing provision shall not be held to limit or restrict the right of any person, firm or corporation who or which has a claim against the state or any state agency, pending before the attorney general on the effective date of this article, from presenting such claim to the court of claims, nor shall it limit or restrict the right to file such a claim as may be, on the effective day of this article, pending in any court of record as a legal claim and which, after such date, may be established in such court to be invalid as a claim against the state because of the constitutional immunity of the state from suit.

§14-2-22. Compulsory process.

In all hearings and proceedings before the court, the evidence and testimony of witnesses and the production of documentary evidence may be required. Subpoenas may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a subpoena or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

§14-2-23. Inclusion of awards in budget.

The clerk shall certify to the director of the budget, on or before the twentieth day of November of each year, a list of all awards recommended by the court to the Legislature for appropriation. The clerk may certify supplementary lists to the board of public works to include all-

sequent awards made by the court. The board of public works shall include all awards so certified in its proposed budget bill transmitted to the Legislature.

§14-2-24. Records to be preserved.

The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the Legislature or any committee thereof for the reexamination of the claim.

§14-2-25. Reports of the court.

The clerk shall be the official reporter of the court. He shall collect and edit the approved claims, awards and statements, and shall prepare them for publication and submission to the Legislature in the form of an annual report.

Claims and awards shall be separately classified as follows:

(1) Approved claims and awards not satisfied but reported to the Legislature for final consideration and appropriation;

2. Approved claims and awards satisfied by payments out of regular appropriations.

3. Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the fiscal year.

4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its annual report to the presiding officer of each house of the Legislature. The annual reports of the court shall be published by the clerk as a public document.

§14-2-20. Fraudulent claims.

A person who knowingly and willfully presents or attempts to present a false or fraudulent claim, or a state officer or employee who knowingly and willfully participates or assists in the preparation or presentation of a false or fraudulent claim, shall be guilty of a misde-

manner. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer or employee, he shall, in addition, forfeit his office or position of employment, as the case may be.

§14-2-27. Conclusiveness of determination.

Any final determination against the claimant on any claim presented as provided in this article shall forever bar any further claim in the court arising out of the rejected claim.

§14-2-28. Award as condition precedent to appropriation.

It is the policy of the Legislature to make no appropriation to pay any claims against the state, cognizable by the court, unless the claim has first been passed upon by the court.

§14-2-29. Severability.

If any provisions of this article or the application thereof to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications

of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.